

### **REMARKS**

This Amendment is submitted in reply to the Final Office Action dated August 7, 2008. With this Amendment, claims 1, 25, 41 and 46 have been amended and claim 2 has been canceled. In reliance on the following remarks, pending claims 1, 3-9, 12, 15-19, 24-30, 41-44, 46 and 53 are now in condition for allowance, and reconsideration and notice to that effect are respectfully requested.

#### **Rejections under U.S.C. § 102**

In the Office Action, claims 1, 3, 5, 7, 12, 16, 17, 41-44, 46, and 53 were rejected under 35 U.S.C. § 102(b) as being anticipated by Barcay et al. (U.S. Patent No. 5,820,855). Claims 1, 3-5, 7, 9, 16-19, 46, 53 were also rejected under 35 U.S.C. § 102(b) as being anticipated by Honsyu et al. (CN 1155978). These rejections will be discussed in conjunction with one another. Independent claims 1, 41 and 46 have been amended to include the limitations of claim 2, which has been canceled without prejudice. Amended claims 1, 41 and 46 now recite an insecticidal bait composition including a water-sensitive insecticide selected from acephate and methamidophos and an insecticide stabilizer selected from boric acid, borate compounds and combinations thereof.

Neither Barcay nor Honsyu disclose, suggest or teach an insecticidal bait composition including a water-sensitive insecticide selected from acephate and methamidophos and an insecticide stabilizer selected from boric acid, borate compounds and combinations thereof. Claims 1, 41 and 46 are thus in condition for allowance. The rejections of claims 1, 41 and 46 should be withdrawn and claims 1, 41, and 46 allowed. In that claims 1, 41 and 46 are in condition for allowance, the rejections of claims 3-5, 7, 9, 12, 16-19, 42-45, 47 and 53, which depend therefrom, should be withdrawn and claims 3-5, 7, 9, 12, 16-19, 42-45, 47 and 53 allowed.

### **Rejections under § U.S.C. 103**

In the Office Action, claims 1-9, 12, 15-19, 24-29, 41, 42, 46 and 53 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Dykstra et al. (WO 91/07972) in view of Twydell (U.S. Patent No. 6,861,075). Claims 1, 25, 41 and 46 recite that the insecticide stabilizer constitutes between about 10% and about 30% by weight of the insecticidal composition. Dykstra et al. do not disclose, suggest or teach an insecticide composition having an insecticide stabilizer constituting between about 10% and about 30% by weight of the composition. Dykstra et al. teach a gelled, aqueous insect bait using, for example, boric acid or acephate as an insecticidal-active ingredient. As acknowledged by the Examiner, the specification of Dykstra et al. does not disclose the use of boric acid as an insecticide stabilizer for stabilizing the insecticide against degradation by water. (Office Action dated 1/28/08, Page 3). Mover, even if both boric acid and acephate are included in the composition of Dykstra et al., Dykstra et al. only teach including 5% boric acid (See Example 1). Accordingly, Dykstra et al. do not disclose, suggest or teach including between about 10% and about 30% insecticide stabilizer.

The Examiner attempts to meet this limitation by relying on Twydell. Twydell discloses a storage-stable biocidal aerated gel composition including between 0.004% to 20% biocide. The biocide is disclosed as being selected from a rodenticide, insecticide and microbicide. Boric acid is identified as being a suitable insecticide. The Examiner asserts that it would have been obvious to modify Dykstra et al. to “increase stability, dispersibility, compatibility of ingredients, processing ease, reduced toxicity to handlers & increased effectiveness by increasing boric acid as shown by Twydell.” (Office Action, p. 3).

Applicants respectfully submit that the Examiner’s rejection fails to establish a prima facie case of obviousness for several reasons. First, the rejection fails to point out or cite any portion of Twydell that actually provides a reason or desire to achieve the broad range of results (stabilization, compatibility, etc.) identified by the Examiner. Second, the rejection fails to point how modifying Dykstra et al. to increase the concentration of boric acid to the claimed range would achieve any of these results. Accordingly, the Examiner’s burden to establish a prima facie case of obviousness has not been met by this rejection.

At most, the rejection suggests increased effectiveness could be achieved by “increasing the amount of boric acid, as shown possible by Twydell.” Although Twydell generally discloses a biocide concentration (0.004% to 20%) that overlaps Applicants’ claimed range, only two examples disclosed in Twydell actually disclose specific compositions including boric acid. Examples 3 and 4 disclose biocidal aerated gel compositions including only 4% boric acid and 1% boric acid, respectively. Accordingly, Twydell not only fails to disclose increasing the concentration of boric acid compared to the compositions of Dykstra et al., it actually teaches using *a lower concentration of boric acid*.

By contrast, amended claims 1, 25, 41 and 46 each recite between about 10% and about 30% by weight of boric acid. It is the amount of boric acid that contributes to the stability of the insecticide and the overall effectiveness of the insecticidal bait composition. At amounts less than or greater than between about 10% and about 30%, the composition did not perform as effectively. As stated in the specification, “Thus, for example, when boric acid was at about 5 to about 10 wt-% the bait was more readily accepted by cockroaches but the acephate was less stable, that is shorter lived and less potent with time. Conversely, when boric acid was at 30-50 wt-% of boric acid, the bait is less readily accepted by cockroaches, that is less attractive and less likely to be consumed, but the acephate was more stable, that is longer-lived and more likely to be lethal with time.” (Page 11 line 26 through page 12, line 2). Moreover, Example 5 on pages 27 and 28 and FIG. 2 demonstrate the unexpected result that boric acid contributes to the stability of an insecticide. In the Example, the amount of acephate remained constant, while the amount of boric acid was adjusted. As can be seen in FIG. 2, the percent of acephate decomposition steadily decreased as the percent of boric acid in the composition increased. Neither Dykstra et al. nor Twydell disclose or suggest that markedly improved stabilization characteristics are achieved when boric acid is used. Accordingly, a person of ordinary skill in the art would not have reasonably expected such results based on the teachings of these references.

Twydell does not disclose that the stability of the composition is derived from the biocide. In fact, the stability of the composition is disclosed as being related to the gelling agent and hydrophobic silica in the composition, “A discovery on which the present

invention is based lies in the use of certain gelling agents which, when added to a premix formed by mixing water and a specific type of hydrophobic silica under high shear conditions and then mixed with the premix also under high shear compositions, gives *a storage-stable aerated gel composition.*" (Col. 2, lines 3-8) (emphasis added). The amount of water also contributes to the stability of the composition, "Typically, however, the amount of water will be in the range of from 80 to 97% by weight to ensure the formation of aerated gel compositions of good consistency and improved stability." (Col. 2, lines 50-53). It is also the process in which the composition is formed that can also effect stability, "If the gelling agent is added before the silica, mixing requires more energy and the homogeneity and stability of the resulting gel composition can be compromised." (Col. 4, lines 17-20). However, there is no mention in the specification that varying the amount of biocide effects the stability of the composition. Applicants respectfully submit that a person of skill in the art would have had no reason to modify Dykstra et al. by increasing the amount of boric acid as taught by Twydell in order to increase stability. Rather, the specification of Twydell teaches altering the concentration of gelling agent, water, or process of forming the composition in order to increase the stability of the composition.

Dykstra et al. and Twydell do not individually or in combination disclose, suggest, or teach including between about 10% and about 30% by weight of boric acid as an insecticide stabilizer. Claims 1, 25, 41 and 46 are therefore in condition for allowance. The rejections of claims 1, 25, 41 and 46 should thus be withdrawn and claims 1, 25, 41 and 46 allowed. In that claims 1, 25, 41 and 46 are in condition for allowance, the rejections of claims 2-9, 12, 15-19, 24, 26-29, 42 and 53, which depend therefrom, should be withdrawn and claims 2-9, 12, 15-19, 24, 26-29, 42 and 53 allowed.

#### **Double Patenting Rejections**

In the Office Action, claims 1-9, 12, 15-19, 24-29, 41, 42, 53 were rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-11 of Barclay et al. (US 7,192,600). Applicants will submit a Terminal Disclaimer with

respect to US 7,192,600 in the event that claims 1, 3-9, 12, 15-19, 24-30, 41-44, 46 and 53 are indicated as allowable by the Examiner.

### **Conclusion**

In summary, pending claims 1, 3-9, 12, 15-19, 24-30, 41-44, 46 and 53 are believed to be patentable for at least the reasons described above. Reconsideration and notice to that effect are respectfully requested. If there are any remaining questions, the Examiner is requested to contact the undersigned at the number listed below.

Respectfully submitted,

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